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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1292

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Petitioner,*

v.

REEVE ALEUTION AIRWAYS, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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International Association of Machinists and Aerospace Workers (the Union) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 24, 1972 (*infra,* p. 1a).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 469 F.2d 990 (*infra*, pp. 2a-7a). The opinion of the District Court is reported at 330 F.Supp. 332 (*infra*, pp. 8a-13a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1972 (*infra*, p. 1a). An order was entered on February 16, 1973 by Mr. Justice William O. Douglas extending the time for filing a petition for a writ of certiorari to March 26, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in a situation in which the statutory procedure for change prescribed by the Railway Labor Act has been satisfied as to some subjects but has not been invoked at all as to others, a carrier may unilaterally alter existing employment terms as to those subjects upon which the statutory procedure has not been invoked or exhausted simply because the duration of the collective bargaining agreement embodying these subjects has expired.

STATUTE INVOLVED

The relevant provisions of the Railway Labor Act specifying the statutory procedure for change which it mandates are set forth *infra*, pp. 14a-18a.

STATEMENT

Pursuant to the Union's certification as the representative by the National Mediation Board (R. 2, 20), the Union and Reeve Aleutian Airways, Inc. (the Com-

pany) entered into a collective bargaining agreement on October 28, 1966, by which the Company, an air carrier, recognized "the Union as the sole and exclusive bargaining agent" for mechanics and related ground personnel (R. 2, 20, 6 (Art. II, pp. 2-7)). The 53-page agreement comprehensively regulated the entirety of the rates of pay, rules, and working conditions of the covered class of employees (R. 6), including illustratively wages, hours of service, seniority, holidays and vacations, and severance pay (*ibid.*). The agreement provided that "[a]ll employees subject to this Agreement shall become members of the Union within sixty (60) days after date of employment, and shall thereafter maintain such membership in good standing as a condition of employment" (R. 6 (Art. XIX(a), p. 46)); it further provided for the check-off by the Company and transmittal to the Union of the union dues and initiation fee payable by an employee upon the employee's individual authorization (R. 6 (Art. XIX(b)(c)(d), p. 47)). Finally, the agreement prescribed the following duration (R. 6 (Art XXI, p. 50)):

> This Agreement shall become effective Novembe 1, 1966, and shall continue in full force and effect until April 1, 1968, and shall renew itself without change until each succeeding April 1st thereafter, unless written notice of intended change is served in accordance with Section 6, Title 1, of the Railway Labor Act, as amended, by either party hereto at least sixty (60) days prior to April 1st in any year after 1967.

On January 30, 1968, the Union notified the Company that it was "opening . . . the agreement for amendment and modification" in the specific respects

defined in the attachment to the notice (R. 2, 7, 20). The attachment identified twenty changes which the Union wished to negotiate (R. 2, 8-10, 20). On its part the Company never served the Union with any written notice of intended changes (R. 2-3, 20, 26-27).

The Company and the Union conducted negotiations during the period of March 24-28, 1968 (R. 44). On April 3, 1968 the Company requested the services of the National Mediation Board (R. 44). Bargaining continued with the assistance of a mediator of the Board on May 23-24, 1968, and in August 1968 (R. 44-45). On September 11, 1968, the Board proffered arbitration but the Union declined (R. 42, 45). On September 18, 1968, the Board notified the parties of the termination of its mediatory efforts and informed them that they were required to maintain the status quo for thirty days thereafter (R. 45).

On October 19, 1968, having been unable to resolve their differences, the Union called a strike against the Company (R. 3, 20, 27, 42, 45). About June 5, 1968, previous to the strike, the members by secret ballot at a union meeting by a margin "in excess of ¾ of the members present voted to authorize the calling of a strike after all of the proceedings before the National Mediation Board had been exhausted" (R. 27).

On September 24, 1969, the Union terminated the strike (R. 27). No agreement had been reached between the Company and the Union concerning changes or modifications in the contract (R. 27). On September 25, 1969, the next day, the Union wrote the Company (a) notifying it that the strike had been discontinued, (b) informing it that the agreement "continues to be in full force and effect," including its "union

security" and "dues deduction" provisions, and (c) requesting that it "honor the terms and conditions of that agreement, including the union security and dues deduction provisions" (R. 3, 11, 20, 27). The letter stated that "There is no question that the agreement is still in full force and effect pursuant to the Railway Labor Act" (R. 11).

On September 30, 1969, the Company informed the Union that it "refused to honor the request made . . . September 25, 1969, and the . . . [Company] has consistently since that date taken the position that there is no contract in effect between it" and the Union (R. 28).

The Union brought an action against the Company seeking a declaration that, while the duration of the collective bargaining agreement between the Company and the Union had expired by its terms on April 1, 1968, the agreement "continues to be in full force and effect" by operation of the Railway Labor Act, except only as to those provisions which had been validly modified pursuant to the procedure for change prescribed by the Railway Labor Act (R. 1-5). In its answer to the complaint the Company averred that there is "no contract in existence" and the Company has "no obligation to perform under expired contract . . ." (R. 20).

On cross-motions for summary judgment (R. 25, 50), the District Court dismissed the complaint (R. 76). It held that "the contract expired by its own terms on April 1, 1968" (R. 71, *infra,* p. 12a), and that "the Railway Labor Act does not operate to extend the term of a contract" (R. 72, *infra,* p. 13a). According to the District Court, once the contractual duration of the

agreement had come to an end, the obligation independently imposed by the Railway Labor Act to maintain the status quo did not endure beyond October 18, 1968, the date thirty days subsequent to the cessation of the mediatory efforts of the National Mediation Board (*supra*, p. 4); thereafter the Company was free to make any unilateral alterations it chose in existing terms regardless of the failure to subject the specific change to the statutory procedures (R. 70-71, 72, *infra*, pp. 11a-12a, 13a). "The only effect of the Railway Labor Act was to prevent the defendant [Company] from making any unilateral changes in pay, rules, and working conditions until remedies under the Act had been exhausted *on October 18, 1968*" (R. 71, *infra*, p. 12a, emphasis supplied). The essence of the District Court's position is that, after the expiration of the fixed duration of an agreement, exhaustion of the statutory procedures as to *some* subjects authorizes unilateral change of *all* subjects.

The Court of Appeals affirmed (*infra*, pp. 2a-7a). It stated the question to be whether, "once a major dispute . . . has run its course pursuant to the Railway Labor Act (resulting in impasse and strike), and the agreement by its terms has come to an end, *other* changes in working conditions can, under the terms of the Act, unilaterally be imposed by the carrier" (*infra*, p. 2a, emphasis in original). It held that *other* changes, on subjects as to which the statutory procedure had neither been invoked nor exhausted, could be unilaterally made. Adverting to the Union's position that "any proposed change in the status quo, whether or not embodied in an agreement, must undergo the statutory procedure of notice, negotiation and mediation", the Court of Appeals stated that "this is not what the

Act says" (*infra,* p. 6a). But it did not explain why the Act does not say precisely this. It addressed neither the terms nor the rationale of the statutory scheme. It articulated no reasoned basis for its conclusion.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question concerning the procedure for change prescribed by the Railway Labor Act in a manner at war with the statutory scheme and in conflict with decisions of this Court, other Courts of Appeals, and the position of the National Mediation Board.

1. *Conflict with the statutory design of the Railway Labor Act:* The essence of the procedure for change prescribed by the Railway Labor Act is that no change may be made in an existing term of employment, whether established by an agreement or subsisting outside an agreement, without first notifying the other party of that intended change and then exhausting the entirety of the procedures specified by the Act as the precondition to effectuating the proposed alteration. Thirty-days written notice of "*an intended change* in agreements" must be given (§ 6, *infra,* p. 16a, emphasis supplied); negotiation of the intended change is mandated (§ 2, First, Second, *infra,* p. 14a); mediation by the National Mediation Board is required if direct negotiation does not resolve the controversy (§ 5, First, *infra,* p. 15a); if mediation is unsuccessful, the Board must try to persuade the parties to agree to voluntary arbitration (*ibid.*); and, failing these efforts, emergency board fact-finding is available upon recommendation of the Board and decision of the President (§ 10, *infra,* pp. 16a-17a). During the pendency of

every step in the proceeding, and for thirty days following its conclusion, the intended change may not be made unilaterally. (§§ 2, Seventh; 5, First; 6; 10; *infra,* pp. 15a-17a). The prohibition of unilateral change except in conformity with the statutory procedure applies not only to terms embodied in agreements but also to those "actual, objective working conditions and practices" which exist outside the agreement. *Detroit and Toledo Shore Line R. Co.* v. *United Transportation Union,* 396 U.S. 142, 153 (1969).

The upshot of the statutory scheme is clear. No unilateral alteration of an existing term may be made without first giving notice of *that* "intended change" (RLA, § 6), and exhausting the "successive procedures designed to induce agreement." *Elgin, Joliet & Eastern R. Co.* v. *Burley,* 325 U.S. 711, 725 (1945). "While the dispute is working its way through these stages, neither party may unilaterally alter the status quo." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 378 (1969). "The Act's status quo requirement is central to its design." *Detroit and Toledo Shore Line R. Co.* v. *United Transportation Union,* 396 U.S. 142, 150 (1969). And " 'the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute.' " *Id.* at 149.

Accordingly, once the statutory procedure governing an "intended change" has been exhausted without agreement, the carrier may make the change in that subject it wishes so long as the alteration which it institutes does not go beyond the proposals on that subject which have been unsuccessfully subjected to the statutory procedures. Conversely, no other change

may be made. Exhaustion of the procedure as to one subject does not justify unilateral alteration of the status quo which exists on another subject. For, as to that other subject, the statutory processes have not even been invoked, much less exhausted. To allow a unilateral change in an existing term without requiring prior subjection of that alteration to the statutory procedures would be destructive of the statutory plan. The essence of the plan is to seek a negotiated solution and to tolerate unilateral action only after recourse to the statutory procedures has failed to produce accord on the issue in dispute. It is antithetical to this plan to permit a unilateral change in an existing term when negotiation of that change has not been sought, undertaken, or the statutory procedures pertaining to it completed.

The courts below nevertheless justify unilateral change as to matters which had not been subjected to the statutory procedure on the ground that the duration of the agreement embodying the altered matters had expired (*infra,* pp. 5a-6a, 11a-13a). But the expiration of the term certain of the agreement is a total irrelevancy. The statutory procedure for change is identical whether the proposed alteration is of a matter embodied in an agreement having a term certain, is contained in an agreement of indefinite duration, or exists outside an agreement. While there is an important difference between an agreement for a fixed term and one of indefinite duration, that difference has nothing to do with compliance with the statutory procedure for change. Where an agreement has a term certain, *by contract* no change may be instituted (absent accord) before the expiration of that term; where an agreement is one of indefinite duration, there is no

contractual period which fixes a term and *by contract* bars an unconsented change before then. Accordingly, the fixed term of an agreement operates as a contractual deferral of the time when the statutory procedure for change can be invoked. But it has no other effect. For whether the agreement is for a fixed term or of indefinite duration, the Railway Labor Act independently governs its alteration, and no unilateral change may be made as to any matter within its compass without first exhausting the statutory procedures as to that specific matter. In short, under the Railway Labor Act, the expiration of a term certain in an agreement eliminates its fixed period duration; it does not eliminate the agreement. It simply leaves the agreement with an indeterminate duration; it does not repeal the requirement of the Railway Labor Act that no change can be made in it until that change has been subjected to the full gamut of the statutory procedures.

This conclusion is confirmed beyond dispute by the requirement that, even as to a condition or practice which exists outside the agreement, no change may be made in it except in conformity with the statutory procedure (*supra,* p. 8). *A fortiori,* an existing condition which has been embodied in an agreement cannot be changed without compliance with the statutory procedures simply because the fixed term of the agreement has expired. The expiration of the fixed period of the agreement does not bring to an end the existence of the employment term which the writing encases. Indeed, the agreement as the embodiment of the rules governing the industrial community which it covers—the stabilization of labor relations which the written

memorial represents—is itself an important part of the status quo, and it cannot therefore be abrogated in disregard of the statutory procedures for change.

Nevertheless, states the Court of Appeals, "this is not what the Act says" (*infra*, p. 6a). But we can discern no possible basis for this assertion except an utterly literalistic reading of section 6 of the Act which this Court has already repudiated. That section requires "at least thirty days' written notice of an intended change *in agreements* . . ." (*infra*, p. 16a, emphasis supplied). Ergo, the Court of Appeals seems to reason, since the fixed term of the agreement has expired, no agreement exists; since no agreement exists, no notice can be given of an intended change "*in agreements*"; and, since no notice can be given, the statutory procedure simply does not come into play! This Court has reached precisely the opposite conclusion. It reads the Act to require notice of an intended change and exhaustion of the statutory procedure even as to matters not contained in an agreement. *Detroit and Toledo Shore Line R. Co.* v. *United Transportation Union*, 396 U.S. 142 (1969); *supra*, p. 8. It rejects just the view apparently entertained by the Court of Appeals that, as the matter is not embodied in an agreement, no notice of "an intended change *in agreements*" can be given, and hence the statutory procedure cannot be applicable. Instead, as this Court holds, a "party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6." (*Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969)), with no limitation related to the existence, expiration, or absence of an agreement.

2. *Conflict with this Court's decision in Florida East Coast*: The decision of the Court of Appeals is thus wholly at odds with the statutory design of the Railway Labor Act. It is also in square conflict with this Court's decision on the precise point in issue. *Brotherhood of Railway Clerks* v. *Florida East Coast Railway Co.*, 384 U.S. 238 (1966).

This Court in *Florida East Coast* held that a carrier may make no permanent unilateral change in the status quo on any subject unless it has first exhausted the statutory procedures as to that subject, and that the collective bargaining agreement as the embodiment of the status quo continues in force and must be observed. In *Florida East Coast*, following exhaustion of the statutory procedures on those issues, the union struck to enforce its demand for a wage increase and for advance notice of layoffs and job abolition. In order to operate during the strike, the carrier instituted changes which had never been subjected to the statutory procedures. The Court held that, even to the limited extent and for the limited purpose of operating during a strike, the carrier could not make any unilateral changes on its own, but could make only such changes as were specifically authorized in advance by the District Court upon a finding that the alteration was " 'reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions.' " 384 U.S. at 242. The Court emphasized that " 'reasonably necessary' " is to be "construed strictly. The carrier must respect the continuing status of the agreement and make only such changes as are truly necessary .... The collective bargaining agreement remains the norm; the burden is on the carrier to show the need for any alteration of it ...." *Id.* at 248. Finally,

and crucially, the Court emphasized that the judicially-sanctioned and strike-limited changes in the agreement *terminate* upon the conclusion of the strike and that the terms of an earlier agreement are restored to their full pre-strike vitality (*id.* at 247, n. 7):

> In this connection, it bears emphasis that the District Court's authorization to deviate in part from the collective bargaining agreement would . . . terminate at the conclusion of the strike. At that time, the terms of the earlier collective bargaining agreement, except as modified by any new agreement of the parties, would be fully in force.

The decision below cannot stand consistently with *Florida East Coast.* In this case the courts below permit *post-strike* repudiation of the agreement, in direct contradiction of this Court's conclusion that upon the termination of the strike the earlier agreement, except as lawfully modified, "would be fully in force." Indeed, repudiation of the agreement could not have been authorized even judicially during the strike, and surely could not have been indulged by the Company on its own, for abrogation of the entirety of the agreement could not be "reasonable necessary" to operation during the strike. In this case, in truth, the courts below allowed the Company to do precisely that which this Court stated a carrier could not do, namely, "tear up and annul, so to speak, the entire collective agreement. . . ." 384 U.S. at 247.

The Court of Appeals would distinguish *Florida East Coast* on the ground that it "dealt with a contract that had no termination date and that continued in force until a new contract had been reached" (*infra,* p. 6a). But, as we have seen (*supra,* pp. 9-11), the kind of duration that an agreement expresses is wholly

irrelevant. Indeed, by operation of the status quo requirement of the Railway Labor Act, the expiration of the fixed term of an agreement simply transforms the agreement from one of definite duration to one of indefinite duration. Upon the expiration of its fixed term the agreement then equates exactly with the indeterminate duration of the agreement in *Florida East Coast*. Furthermore, the status quo which the agreement memorializes does not come to an end simply because its term certain expires. A status quo necessarily continues to exist even if an agreement does not. The statutory imperative of maintaining the status quo free of unilateral change except in conformity with the Act's procedures retains therefore its full vitality.

The distinction drawn by the Court of Appeals would work an idiosyncratic and mischievous bifurcation in the two industries that the Railway Labor Act regulates. In air transportation, as here, agreements customarily provide for a term certain. In rail transportation, in contrast, agreements customarily do not provide for a term certain. The difference would mean, adopting the distinction of the Court of Appeals, that in the air field entire abrogation of the status quo is permissible once the statutory procedure has been exhausted as to any one subject, but that in the rail field the status quo is preserved in full and any change must be preceded by notice and exhaustion of the statutory procedure as to the specific matter it encompasses before it may be unilaterally effectuated. Yet there is nothing in the design of the Railway Labor Act, the nature of the two industries, or the difference between agreements of definite and indefinite duration to justify such radically dissimilar treatment. In the air field, under the regime of term certain agreements which prevails there, unions and carriers acquire *by*

contract freedom from any change for the fixed period preceding the expiration of the term of the agreement. In the rail field, under the regime of indefinite duration agreements which prevails there, unions and carriers have no time during the term of an agreement when changes are contractually barred. But, whether the time for change is contractually postponed as in the air field, or whether the time for change is subject to no contractual deferral as in the rail field, in both fields no alteration in any subject may take place sooner than the time when the statutory procedure as to that specific subject has been exhausted. The Court of Appeals heedlessly destroys this essential statutory symmetry.

3. *Conflict with decisions of other Courts of Appeals:* The decision below conflicts with decisions of the Second Circuit (*Manning* v. *American Airlines*, 329 F.2d 32 (C.A. 2, 1964), cert. denied, 379 U.S. 817 (1964)), and the District of Columbia Circuit (*Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, 385 F.2d 581 (C.A.D.C., 1967), cert. denied, 390 U.S. 923 (1968)), each holding that by operation of the Railway Labor Act the expiration of the fixed term of an agreement does not affect its continuing durability, and that any change in any of its provisions can be made only by subjecting the specific provision to the procedure for alteration which the Act prescribes.

As the Second Circuit holds, "The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination" (329 F.2d at 17). As the District of Columbia Circuit explains (385 F.2d at 593):

> The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—be-

> yond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. *This . . . reasoning applies even though the work rules are established by agreements of limited duration.* [Emphasis supplied.]

In short, "the prior agreements of the parties . . . themselves endure by virtue of the Railway Labor Act unless and until changed in accordance with that statute." 385 F.2d at 609.

The Court of Appeals does not address itself at all to the decision of the District of Columbia Circuit, but it would distinguish the decision of the Second Circuit on the ground that it "dealt with a unilateral change imposed by the carrier during the status quo period" (*infra*, p. 6a). But the relevant teaching of the Second Circuit's decision is, not that the status quo period had not yet run its course, but that the expiration of the fixed term of the contested provision did not allow the carrier to alter it without first subjecting it to the statutory procedure for change.

The decision below also conflicts with the uniform judicial interpretation of the import of the notice requirement of section 6 of the Railway Labor Act. That section requires notice of "intended change" as the threshold precondition to ultimate alteration of existing terms. The manifest objective of requiring identification of "intended change" is to focus the statutory procedures upon the proposed alteration in the hope of effectuating an agreed solution. This purpose would be utterly frustrated were exhaustion of

the statutory procedures on the identified change to be the predicate for unilateral alteration of other matters which had not been put in issue and on which the Act's processes had not operated at all. It is pointless to identify an "intended change" if any other may in any event be made.

It is for this further reason that judicial decision has uniformly restricted the union's right to strike and the employer's right to make a unilateral change to those matters which the section 6 notice of "intended change" had put in issue and on which the Act's processes had fully operated. "The purpose of a Section 6 notice is 'to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract.'" *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, 385 F.2d 581, 596 (C.A. D.C., 1967), cert denied, 390 U.S 923 (1968) In consequence, "a Section 6 notice is adequate if it informs a party of the purpose sought to be attained by the other party with sufficient definition to enable the former to understand the implications of the notice and proposed means adapted to the goal's attainment" *Pullman Co.* v. *Order of Railway Conductors*, 316 F.2d 556, 562 (C.A. 7, 1963), cert. denied, 375 U.S. 820 (1963). "If the . . . Section 6 notice properly raised the issues involved in the strike and the procedures of the Railway Labor Act were followed and exhausted pursuant to that notice, then the strike could not be enjoined . . ." (*Brotherhood of Railroad Trainmen* v. *Southern Ry. Co.*, 393 F.2d 303, 308 (C.A. 5, 1968); conversely, no strike could take place over a matter not put in issue by the notice and upon which the Act's processes had not operated. And, by exact parity, the carrier is restricted in the unilateral changes it is free to make to

those alterations which are within the scope of the notice and which have been proposed and unsuccessfully negotiated through the successive statutory steps. *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342 (1944); *Railroad Yardmasters* v. *Pennsylvania Railroad,* 224 F.2d 226 (C.A. 3, 1955).

4. *Conflict with the position of the National Mediation Board:* The decision below conflicts with the position of the National Mediation Board. As the Board explains, "When the procedures of the act have been exhausted without an agreement between the parties on the 30-day notice of intended change, the carrier may alter the contract *to the extent indicated in the 30-day notice. . . . The other provisions of the contract are not affected and remain unchanged*" (Administration of the Railway Labor Act by the National Mediation Board 1934-1970, p. 30, emphasis supplied):

> Section 6 states that where notice of intended change in an agreement has been given, rates of pay, rules, and working conditions shall not be altered by the carrier until the controversy has been finally acted upon in accordance with specified procedures. Positively stated, section 6 is intended to maintain the contract as it existed between the parties until the provisions of the act have been complied with. When the procedures of the act have been exhausted without an agreement between the parties on the 30-day notice of intended change, the carrier may alter the contract *to the extent indicated in the 30-day notice,* and the organization is free to take such action as it deems advisable under the circumstances. *The other provisions of the contract are not affected and remain unchanged.* In brief, the rights of the parties which they had prior to serving the notice of intention to change remain the same during

> the period the proposal is under consideration, and remain so until the proposal is finally acted upon.

We need hardly add that "this Court shows great deference to the interpretation given the statute by the agency charged with its administration." *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

5. *The mischief which the decision blow works:* The mischief of unilateral change effectuated without compliance with the Railway Labor Act is exemplified in this case by the Company's repudiation of the union security and check-off provisions of the agreement. Union security and check-off are within the statutory scope of "rates of pay, rules, or working conditions" and are therefore within the Act's purview.[1] They are of obvious importance to the capacity of a union to function effectively. Congress authorized their negotiation "as a specific response to the recognition of the expenses and burdens incurred by the unions in the administration of the complex scheme of the Railway Labor Act." *IAM* v. *Street,* 367 U.S. 740, 751 (1961). It is the mechanism by which employees "share the costs of negotiating and administering collective agreements, and the costs of adjustment and settlement of disputes." *Id.* at 764.

Yet, without a word in the Section 6 notice articulating an "intended change" in the existing provisions for union security and check-off, and without in any way subjecting the matters to the statutory procedures looking toward agreed solution, the Company unilaterally abrogated both. Each was repudiated in

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[1] *Manning* v. *American Airlines,* 329 F.2d 32, 34-35 (C.A. 2, 1964), cert. denied, 379 U.S. 817 (1964).

total disregard of the Act's requirement that no change shall be made without notifying the other party of the proposed alteration and subjecting the matters to the entire gamut of the Act's processes. Instantaneous extinction was effectuated in defiance of the " 'procedures of the Act [which] are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute.' " *Detroit and Toledo Shore Line R. Co.* v. *United Transportation Union,* 396 U.S. 142, 149 (1969).

And the mischief was in this case multiplied many times by the simultaneous extinction of the many other provisions of the agreement which had not been put in issue by the Section 6 notice and had not been subjected to the Act's processes. It was as if, the Union having been unsuccessful in its strike for limited objectives, the statute ceased to exist altogether and the Company was freed to engage in unbridled unilateral action.

A prompt end is required to so mutilating an interpretation of the central feature of a major regulatory statute. The decision below is heedless of the plain purport of the statutory scheme, conflicts with decisions of this Court and other Courts of Appeals, and is inconsistent with the position of the National Mediation Board. Review is essential.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be grantd.

Respectfully submittd,

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March 1973.

APPENDIX

APPENDIX

I

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
U.S. COURT OF APPEALS AND POST OFFICE BUILDING

7TH & MISSION STREETS, P.O. BOX 547

SAN FRANCISCO, CALIFORNIA 94101

Re: No. 71-2684 INTERNATIONAL ASSN. OF MACHINISTS ET AL v. REEVE ALEUTIAN AIRWAYS, INC., ETC.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 11-24-72 Affirmed the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

WILLIAM B. LUCK,
Clerk of Court

II

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-2684

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, an unincorporated labor organization,
Plaintiff-Appellant,

v.

REEVE ALEUTIAN AIRWAYS, INC., an Alaska corporation,
Defendant-Appellee.

[November 24, 1972]

On Appeal from the United States District Court
for the District of Alaska

Before: MERRILL, DUNIWAY, and TRASK, Circuit Judges.

MERRILL, Circuit Judge:

This case presents the question whether, once a major dispute (respecting certain proposed changes in working conditions as embodied in a collective bargaining agreement) has run its course pursuant to the Railway Labor Act (resulting in impasse and strike), and the agreement by its terms has come to an end, *other* changes in working conditions can, under the terms of the Act, unilaterally be imposed by the carrier.

The union contends that notwithstanding the fact that the agreement had expired by its terms, it nevertheless continued in force and effect by operation of the Act, and that no change from the working conditions status quo as it existed under the agreement can be imposed without complying with the procedures for settlement of major disputes established by the Act.

The District Court held against the union upon this proposition. *International Ass'n of Machinists & Aerospace Workers* v. *Reeve Aleutian Airways,* 330 F.Supp. 332 (D.Alas. 1971).

Appellant union is the certified representative of mechanics and related personnel employed by appellee company. The collective bargaining agreement between the parties provides:

> "This agreement shall become effective November 1, 1966, and shall continue in full force and effect until April 1, 1968, and shall renew itself without change until each succeeding April 1st thereafter, unless written notice of intended change is served in accordance with Section 6, Title 1, of the Railway Labor Act, as amended, by either party hereto at least sixty (60) days prior to April 1st in any year after 1967."

On January 30, 1968, the union notified the company that it was "opening * * * the agreement for amendment and modification." Twenty changes were specified for negotiation. The company gave no notice of any intended change.

Negotiations followed between the company and the union, and on April 3, 1968, the company requested the services of the National Mediation Board. Bargaining continued with the assistance of a mediator of the Board without success. On September 11, 1968, the Board suggested arbitration, but the union declined. On September 18, 1968, the Board notified the parties of the termination of its mediatory efforts and informed them that they were required to maintain the status quo for thirty days thereafter. On October 19, 1968, having been unable to resolve their differences, the union called a strike against the company.

On September 24, 1969, the union terminated the strike. No agreement had been reached between the company and

the union concerning changes or modifications in the contract. On September 25, 1969, the union wrote to the company notifying it that the strike had been discontinued, informing it that the agreement "continues to be in full forces and effect," including its union security and dues deduction provisions, and requesting the company to honor the conditions of the agreement including those terms. On September 30, 1969, the company informed the union that it refused to honor the request made, since the company had consistently taken the position that there was no contract between it and the union following the termination date.

This action was brought by the union, seeking a declaratory judgment that the agreement continued in effect by operation of the Act save as to the provisions which had been subjected to the Act's procedures. The District Court, on motion of appellee, dismissed the complaint and this appeal followed. We affirm. The relevant provisions of the Act are set forth in the margin.[1]

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[1] § 2 Seventh of the Act, 45 U.S.C. § 152 Seventh, provides:

"No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

§ 6 of the Act, 45 U.S.C. § 156, provides:

"Procedure in changing rates of pay, rules and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Medi-

The District Court held:

"The sole issue presented is whether the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*, has the effect of extending a collective bargaining agreement beyond the termination date specified in the agreement. * * * *

There is nothing in the Railway Labor Act which extends a contract beyond its termination date. 45 U.S.C.A. § 156 (1954) merely prohibits any unilateral changes in pay, rules, and working conditions until the statutory conciliation procedures have been exhausted and the 30-day mandatory waiting period has expired. The statutory conciliation procedures were fully complied with after the good offices of the Mediation Board had been unsuccessfully invoked, a proffer of arbitration had been declined, and the mandatory 30-day waiting period had expired. 45 U.S.C.A. § 155 (1954).

The terms of the agreement called for its termination on the first day of April following notice by *either* party of intended changes. It is irrelevant that defendant [Company] never served notice of any intended changes, and it is of no consequence that only portions of the contract were subject to negotiation. The contract expired by its own terms on April 1, 1968. The only effect of the Railway Labor Act was to prevent the defendant from making any unilateral changes in pay, rules, and working conditions until remedies under the Act had been exhausted on October 18, 1968." 330 F. Supp. at 333-35.

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ation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

We agree with the District Court's construction of the Act. It is the provision of § 6 to the effect that "rates of pay, rules or working conditions shall not be altered" upon which the union relies and the construction of which is here brought in question.

The status quo, thus frozen, applies to working conditions whether or not they are embodied in agreements. *Detroit & Toledo Shoreline RR. Co.* v. *United Transportation Union,* 396 U.S. 142 (1969). From this the union concludes that any proposed change in status quo, whether or not embodied in an agreement, must undergo the statutory procedure of notice, negotiation and meditation.

But this is not what the Act says. The Act is concerned with procedures to be followed respecting proposed *changes in agreements.* Once a change has been noticed, the status quo provision of § 6 comes into play. It serves to freeze conditions, whether or not they are the subject of agreement, but it does not come into play until a proposed change in agreement has been noticed.

Cases upon which the union relies do not support its contentions.

Detroit & Toledo dealt with a unilateral change imposed by the carrier during the status quo period. The same is true of *Manning* v. *American Air Lines, Inc.,* 329 F.2d 32 (2d Cir.), cert. denied, 379 U.S. 817 (1964). *Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Ry. Co.,* 384 U.S. 238 (1966), dealt with a contract that had no termination date and that continued in force until a new contract had been reached. The question there was whether the contract continued in effect during the course of a strike. It was held that the strike did not serve to terminate the contract. Here, however, it is not the strike but the contract terms themselves that have brought the contract to an end.

Our case is similar to *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines, Inc.*, 359 F.2d 303 (2d Cir. 1966).[2]

Judgment affirmed.

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[2] There the court stated (359 F.2d at 310):

"The collective bargaining agreement between Eastern and FEIA was signed on December 31, 1958. By its terms, it was to continue in force until April 1, 1960, renewable thereafter on a yearly basis until notice of a desire to change the agreement was served by either party on the other prior to April 1st of any year. Such a notice was sent by FEIA on February 8, 1960. Negotiations between the parties continued intermittently until February 1962, and were followed by the appointment of a presidential emergency board under Section 10 of the Act. The Board filed its report to the President on May 1, 1962, and the freezing of the situation which had been caused by the appointment of the emergency board ended thirty days later. After June 1, 1962, the contract was no longer in effect and the union was free to strike. [Authorities] Unlike the collective bargaining agreement considered in Manning v. American Airlines, Inc., 329 F.2d 32 (2d Cir.) cert. denied, 379 U.S. 817, 85 S.Ct. 33, 13 L.Ed.2d 29 (1964), the status quo provisions of the Railway Labor Act had ceased to operate. Nor does FEIA suggest the existence of any conduct on the part of both parties which could serve as the basis for an argument that the parties had agreed to keep the former contract in effect although it was extinct by its own terms. The time for economic warfare had arrived, and the battle was not slow in coming."

III

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. A-158-69 Civil

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, an unincorporated labor organization, *Plaintiff*,

v.

REEVE ALEUTIAN AIRWAYS, INC., an Alaska corporation, *Defendant*.

Memorandum of Decision and Order

On October 28, 1966 defendant airlines and plaintiff as the certified bargaining agent of certain employees of defendant, entered into a contract covering rates of pay, rules, and working conditions for mechanics and certain other personnel. The contract contained the following provision:

> "This Agreement shall become effective November 1, 1966 and shall continue in full force and effect until April 1, 1968, and shall renew itself without change until each succeeding April 1st thereafter, unless written notice of intended change is served in accordance with Section 6, Title 1, of The Railway Labor Act, as amended, by either party hereto at least sixty (60) days prior to April 1st in any year after 1967.

On January 30, 1968, the plaintiff, pursuant to Section 6, Title 1 of the Railway Labor Act, 45 U.S.C. § 156, (1954) and the above quoted section of the contract, served written notice of intent to change certain portions of the contract on defendant. Pursuant to the Railway Labor Act, plaintiff and defendant entered into direct negotiations and also into negotiations in conjunction with the Federal

Mediator. The parties negotiated only on the changes requested by plaintiff, as defendant never gave notice of an intent to change any portion of the contract.

On September 11, 1968, the National Mediation Board (hereinafter referred to as the Board), made a proffer of arbitration which plaintiff declined to accept as it had a right to do under 45 U.S.C.A. § 155 (1954). On September 18, the Board advised defendant that their services had terminated, at which time the parties entered into a 30-day cooling off period.

Pursuant to a vote of its membership, held on or about June 5, 1968, plaintiff struck defendant on October 19, 1968, the first day after the expiration of the 30-day cooling off period. On August 24, 1969, all strike activities ceased, despite the fact that no agreement had been reached on the proposed changes.

On September 25, 1969, an authorized representative of plaintiff notified defendant of the Union's position that the contract remained in full force and effect, and demanded that defendant adhere to Article XIX, pertaining to Union security and dues deduction provisions.

The matter is before the court on cross motions for summary judgment.[1] The sole issue presented is whether the

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[1] Plaintiff's motion was filed July 22, 1970. At the court's suggestion defendant filed a cross motion on January 25, 1971. Of counsel for plaintiff in this matter is a Minnesota law firm. In the interim between the filing of plaintiff's motion and the issuance of an order dated March 26, 1971 granting the defendant's unopposed motion, plaintiff's local counsel was appointed Judge of the Superior Court, Third Judicial District, State of Alaska. Plaintiff has moved for relief from the order of March 26, 1971 under Rule 60(b), Federal Rules of Civil Procedure, citing difficulties in obtaining in-state counsel and consequent lack of communication with the local plaintiff during this period. The motion is unopposed, and for good cause shown is hereby granted.

Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*, has the effect of extending a collective bargaining agreement beyond the termination date specified in the agreement.

45 U.S.C.A. § 181 (1954) subjects common carriers to §§ 151, 152 and 154-163 of Title 45. Section 152 (Seventh) reads as follows:

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this Title."

Section 156 provides for 30-day notice of intention to change provisions of the agreement and continues:

> "In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions *shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, . . .*" (Emphasis added.)

Under § 155, unless the parties agree to submit their differences to arbitration, the Board's function is terminated following the unsuccessful attempt at mediation. As a "final required action" the Board may attempt to induce the parties to arbitrate or recommend to the President that an emergency investigatory board be empaneled under 45 U.S.C.A. § 160 (1954). While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. Detroit & Toledo Shore Line R. Co. v. United Trans. Union, 396 U.S. 142, 149 (1969); Railroad Trainmen v. Terminal Co., 394 U.S. 369, 378 (1969).

Plaintiff contends that the overriding concern for labor-management peace in the common carrier industry requires this court to construe the Railway Labor Act as extending collective bargaining agreements, or at least such portions thereof as have not been opened for negotiation, beyond their term until a new agreement is reached. The only authority cited for this proposition is dictum contained in a footnote to *Brotherhood of Rwy. & Steamship Clerks* v. *Florida E.C.L.*, 384 U.S. 238, 247 at n. 7 (1966). In Florida East Coast the Supreme Court held that during a strike an employer subject to the Railway Labor Act can make only such unilateral changes as are strictly necessary to continue serving the public, and that the collective bargaining agreement remains the norm of management labor relations despite the strike. Plaintiff points to dictum which seems to indicate that after a strike the earlier collective bargaining agreement, except as modified by any new agreement of the parties, would again be fully in force. 384 U.S. at 238, n. 7.

Although it is not entirely clear from the language of the opinion, it appears that the underlying collective bargaining agreement had not expired. Florida East Coast had not argued that the agreement had terminated, but only that it was suspended during the strike. See Florida East Coast Rwy. Co. v. Brotherhood of Railroad Trainmen, 336 F.2d 172 (1964).

There is nothing in the Railway Labor Act which extends a contract beyond its termination date. 45 U.S.C.A. § 156 (1954) merely prohibits any unilateral changes in pay, rules, and working conditions until the statutory conciliation procedures have been exhausted and the 30-day mandatory waiting period has expired. The statutory conciliation procedures were fully complied with after the good offices of the Mediation Board had been unsuccessfully invoked, a proffer of arbitration had been declined, and the mandatory 30-day waiting period had expired. 45 U.S.C.A. § 155 (1954).

The terms of the agreement called for its termination on the first day of April following notice by *either* party of intended changes. It is irrelevant that defendant never served notice of any intended changes, and it is of no consequence that only portions of the contract were subject to negotiation. The contract expired by its own terms on April 1, 1968. The only effect of the Railway Labor Act was to prevent the defendant from making any unilateral changes in pay, rules, and working conditions until remedies under the Act had been exhausted on October 18, 1968.

In suits under § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 185 (1965), involving the National Labor Relations Act [2] (N.L.R.A.), contract termination provisions similar to the ones here in question have been held applicable where modification of the contract is requested by one of the parties. Baker v. Fleet Maintenance, Inc. 409 F.2d 551 (7th Cir. 1969). Procter & Gamble Ind. Union v. Procter & Gamble Mfg. 312 F.2d 181 (2nd Cir. 1962), *cert. den.* 374 U.S. 830 (1963).

In *East Bay U. of Mach., Local 1304* v. *Fiberboard Paper Prod. Corp.*, 285 F. Supp. 282 (N.D. Cal. 1968), *aff'd* 435 F.2d 556 (9th Cir. 1970), the court had before it a contract termination provision which was similar to the one in dispute. The court held that a notice of modification prevented automatic renewal of the agreement, despite the fact that the subject of the dispute was not at issue in the negotiations over the proposed changes.

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[2] Section 8(d) of the N.L.R.A., 29 U.S.C.A. § 158(d), contains provisions for a negotiation and cooling off period which parallel those of the Railway Labor Act. While analogies to the N.L.R.A. must be "drawn circumspectly," reference to established precedent under the N.L.R.A. may be used "to determine whether it [the conduct of the parties to a dispute under the R.L.A.] is within the general penumbra of conduct held protected under the Act or whether it is beyond the pale of any activity thought permissible." Brotherhood of Rwy. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383-384 (1969).

In summary, the Railway Labor Act does not operate to extend the term of a contract. As a matter of law, the contract expired by its own terms on the first day of April following the plaintiff's notice of proposed modifications in the existing agreement, although defendant was obliged by the Railway Labor Act to maintain the status quo until the statutory mediation provisions had been exhausted.

While certain employee rights, such as pension and retirement benefits, may become vested, and hence may retain their vitality after the expiration of the union contract which created them, union security and dues check off provisions are matters of contract between the union and the employer and consequently do not survive the termination of the contract. Industrial Union of Marine & Shipbuilding Workers, 320 F.2d 615, 619 (3d Cir. 1963), *cert. den.* 375 U.S. 984 (1964); Bethlehem Steel Co., 133 N.L.R.B. 1347 (1961); Standard Oil, 144 N.L.R.B. 520 (1963). *Cf.* N.L.R.B. v. United Automobile A. A. & Imp. Workers, 297 F.2d 272 (1st Cir. 1961).

Accordingly, it is hereby ORDERED:

1. Plaintiff's motion for relief from this court's order of March 26, 1971 is granted.

2. Plaintiff's motion for summary judgment is denied.

3. Defendant's motion for summary judgment is granted.

/s/ RAYMOND E. PLUMMER
United States District Judge

Dated: Aug. 16, 1971

IV

Excerpts from Railway Labor Act

44 Stat. 577 (1926), as amended by 48 Stat. 1185 (1934) 49 Stat. 1189 (1936), 54 Stat. 785 (1940), 64 Stat. 1238 (1951), 78 Stat. 748 (1964), 80 Stat. 208 (1966); 45 U.S.C. §§ 151-188

General Purposes

§ 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between repre-

sentatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * * * *

FUNCTIONS OF MEDIATION BOARD

§ 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify

both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * * *

PROCEDURE IN CHANGING RATES OF PAY, RULES, AND WORKING CONDITIONS

§ 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with references thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * * * *

EMERGENCY BOARD

§ 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential

transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

Title II

§ 201. All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

§ 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 1 thereof.

§ 203. The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by section 5 of title I of this Act.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1292

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Petitioner*,

vs.

REEVE ALEUTIAN AIRWAYS, INC., *Respondent*.

BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether, in a situation where a major dispute as to certain proposed changes in the terms of a collective bargaining agreement has run its course pursuant to the Railway Labor Act and a strike has taken place, and the agreement by its terms has ended, a carrier may unilaterally impose changes other than the ones proposed.

STATEMENT OF THE CASE

On October 28, 1966, International Association of Machinists and Aerospace Workers (the Union) and Reeve Aleutian Airways, Inc. (the Company), entered into a collective bargaining agreement covering pay rates, rules, working conditions, and various other aspects of employment (R. 6). The duration of the contract was described (R. 6, Art. XXI, p. 50) as follows:

> "This Agreement shall become effective November 1, 1966, and shall continue in full force and effect until April 1, 1968, and shall renew itself without change until each succeeding April 1st thereafter, unless written notice of intended change is served in accordance with Section 6, Title 1, of the Railway Labor Act, as amended, by either party hereto at least sixty (60) days prior to April 1st in any year after 1967."

On January 30, 1968, the Union notified the Company by letter of proposed changes in the contract (R. 7):

> "In accordance with Section 6, Title 1, of the Railway Labor Act, as amended, and the current labor agreement between the parties, you are hereby notified that we are opening the attached provisions of the agreement for amendment and modification."

The Company and the Union negotiated unsuccessfully from March 24 to March 28, 1968 (R. 44). On April 3, 1968, the Company requested the services of the National Mediation Board, whose mediator super-

vised bargaining sessions on May 23, 1968, and May 24, 1968 (R. 44). Further mediation sessions were conducted during August of 1968 (R. 45). All were unsuccessful. On September 11, 1968, the National Mediation Board requested the parties to submit to arbitration, but the Union declined (R. 45). On September 18, 1968, the Board notified the parties of the termination of its services and informed the parties of the 30-day "cooling off" period during which the status quo was to be maintained (R. 45).

On October 19, 1968, the Union instructed or caused its members to withdraw all services from the Company, and continued to do so even after this suit was filed (R. 45-46), although the strike was technically discontinued on September 24, 1969 (R. 27).

On September 24, 1969, the Union sent the Company a letter stating that the collective bargaining agreement of October 28, 1966, was still in effect, and demanded that the Company comply with the union security and dues deduction provisions (R. 11). The Company refused, asserting that the contract had been terminated (R. 27-28). The Union then initiated this action in the United States District Court seeking a declaration that those terms of the expired contract which the Union had not sought to change continued to bind the Company.

The District Court granted the Company's motion for Summary Judgment on the ground that the Railway Labor Act did not operate to extend the term of the contract; the Court of Appeals affirmed, and the Union petitioned this Court for certiorari.

REASONS FOR NOT GRANTING THE WRIT

1. THERE IS NO CONFLICT WITH THE STATUTORY DESIGN OF THE RAILWAY LABOR ACT

The decision of the Court of Appeals was clearly consistent with the terms of the contract between the Company and the Union, and the Railway Labor Act does not require a contrary result.

The collective bargaining agreement which is the subject of this litigation provided that its duration should run until April 1, 1968, and that it should thereafter renew itself each succeeding April 1 unless proper written notice of intended change were served by either party within the prescribed time. The Union served appropriate notice of intended change upon the Company on January 30, 1968, within the time set forth in the contract. Consequently, the contract terminated on April 1, 1968.

The Railway Labor Act was never intended to provide anything other than a federally sanctioned forum, in which labor and management were required to bargain with each other before resorting to economic warfare. The purpose of the Act was quite simply to keep the railroads running during negotiations, so as to avoid an unnecessary public outcry for no-strike legislation and compulsory arbitration. See *Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce,* 69th Congress, 1st Sess., 53-55, 90-93 (1926); 67 Cong. Rec. 4702-4705 (1926). Although compulsory arbitration and antistrike provisions were discussed, both labor and management generally felt these measures too extreme and im-

practical, even in view of the public interest in keeping transportation routes open. 67 Cong. Rec. 4702-4705, 9203-9206 (1926); *Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 22 L.Ed.2d 344 (1969). Nowhere in the proceedings before the House and Senate Committees, nor on the floor of either the House or the Senate, is there any intimation that anyone thought the "status quo" provisions would continue to bind the parties after a strike. On the contrary, it shows that witnesses and lawmakers alike considered the proposed bill to place on labor and management the duty to negotiate cooly in the hope of avoiding a strike. What should happen after the strike was over was never discussed, as far as counsel can determine. 67 Cong. Rec. (1926); *Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce,* 69th Cong., 1st Sess. (1926); *Hearings on S. 2306 before the Senate Committee on Interstate Commerce,* 69th Cong., 1st Sess. (1926).

It is well settled that once the Act's conciliatory machinery has run its course, the parties may resort to self-help; that is, the Union may strike, and the Company may (indeed, *must*) continue to operate. *Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 22 L.Ed.2d 344 (1969); *Brotherhood of Locomotive Engineers v. Baltimore and O. R. R. Co.,* 372 U.S. 284, 9 L.Ed.2d 759 (1963); *Elgin, Joliet and Eastern Ry. Co. v. Burley,* 325 U.S. 711, 89 L.Ed. 1886 (1945). The possibility that economic warfare might occur in spite of the Act was

foreseen by its proponents, who nevertheless offered the legislation as a *deterrent* to such measures. See the testimony of Donald R. Richberg, Counsel for the Organized Railway Employees, *Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce,* 69th Congress, 1st Sess., at p. 55 (1926), and of A. P. Thom, General Counsel for the Association of Railway Executives, *id.,* at p. 117.

It is therefore evident that once a strike (or other self-help measure by either side) takes place, the very evil which the Act was designed to discourage has occurred, and its usefulness and applicability have come to an end. The interpretation urged by the Union, which would require that the parties resume a "status quo" long since abandoned by both sides, has no reasonable relationship to the purpose of the Act as set forth in its legislative history.

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2. THERE IS NO CONFLICT WITH PRIOR DECISIONS OF THIS COURT

The Union claims that *Brotherhood of Ry. and S. S. Clerks v. Florida East Coast Ry. Co.,* 384 U.S. 238 (1966) requires that the status quo be maintained after the termination of the contract, after the procedures of the Act have been exhausted and after the Union has called (and finally ended) a strike. The only stated authority for this interesting interpretation is footnote 7 of the opinion.

It is clear, however, that the contract in *Florida East Coast* expressly provided that it should continue

in force until a new agreement was reached. See the Court of Appeals' decision below, 469 F.2d at 993. Therefore, as the Court of Appeals held, the fact situations are dissimilar, and the contract in the instant case was terminated.

All the Union's assertions of law are anchored to a most tenuous proposition: that the parties cannot contract for a fixed term, but instead, having once signed a contract, they are "locked in" indefinitely to provisions as to which neither party requested change. Precedent for such a requirement cannot be found in any of this Court's opinions. The Union says in essence that the parties can never make an agreement for a time certain, regardless of the intent and objectives at the time of negotiation. Such an interpretation would seriously hamper the freedom of parties to contract with each other in a manner deemed mutually appropriate. As set forth above, there is no valid public policy reason which compels a result unintended and undesired by the parties.

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3. THE DECISION IS CONSISTENT WITH OPINIONS IN OTHER COURTS OF APPEALS

As noted in its opinion, the decision of the Court of Appeals is consistent with the Second Circuit's ruling in *Flight Engineers' International Ass'n, EAL Chapter, AFL-CIO v. Eastern Airlines, Inc.*, 359 F.2d 303 (2d Cir. 1966), which reads in relevant part as follows:

> "The collective bargaining agreement between Eastern and FEIA was signed on December 31,

1958. By its terms, it was to continue in force until April 1, 1960, renewable thereafter on a yearly basis until notice of a desire to change the agreement was served by either party on the other prior to April 1st of any year. Such a notice was sent by FEIA on February 8, 1960. Negotiations between the parties continued intermittently until February 1962, and were followed by the appointment of a presidential emergency board under Section 10 of the Act. The Board filed its report to the President on May 1, 1962, and the freezing of the situation which had been caused by the appointment of the emergency board ended thirty days later. After June 1, 1962, the contract was no longer in effect and the union was free to strike (Citations omitted). Unlike the collective bargaining agreement considered in Manning v. American Airlines, Inc., 329 F.2d 32 (2nd Cir.), cert. denied, 379 U.S. 817, 85 S.Ct. 33, 13 L.Ed. 2d 29 (1964), the status quo provisions of the Railway Labor Act had ceased to operate. Nor does FEIA suggest the existence of any conduct on the part of both parties which could serve as the basis for an argument that the parties had agreed to keep the former contract in effect although it was extinct by its own terms. The time for economic warfare had arrived, and the battle was not slow in coming."

It is well settled that a collective bargaining agreement, even under the Railway Labor Act, does not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions. *Elder v. New York*

Central R. Co., 152 F.2d 361 (6th Cir. 1945); *System Federation No. 59 of Railway Employees Department of A. F. of L. v. Louisiana and A. R. Co.*, 119 F.2d 509 (5th Cir. 1941); *Flight Engineers' International Ass'n, EAL Chapter, AFL-CIO v. Eastern Airlines, Inc.*, 359 F.2d 303 (2d Cir. 1966).

In *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 22 L.Ed.2d 344 (1969), the Supreme Court noted:

> "Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute." 394 U.S. at 378.

The Court went on to say:

> "The Court has in the past referred to the NLRA for assistance in construing the Railway Labor Act, see, *e.g., Steele v. Louisville and N. R. Co.*, 323 U.S. 1972, 200-201 (1944); *Railroad Trainmen v. Toledo P. and W. R. Co.*, 321 U.S. 50, 61, n. 18 (1944), and we do so again here." 394 U.S. at 383.

Thus the court has placed its sanction upon a properly limited reference to the N.L.R.A. when attempting to interpret the Railway Labor Act. Cases decided under the N.L.R.A. hold that an extension of the expired contract cannot be implied from the acts of the parties. *Procter and Gamble Independent Union of Port Ivory, N.Y. v. Procter and Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir. 1962), cert. denied 374 U.S. 830 (1963); *Baker v. Fleet Maintenance, Inc.*, 409 F.2d 551 (7th Cir. 1969); *East Bay Union of Ma-*

chinists, Local 1304, United Steelworkers of America, AFL-CIO v. Fibreboard Paper Products Corp., 285 F.Supp. 282 (N.D. Cal. 1968), aff'd 435 F.2d 556 (9th Cir. 1970); *N.L.R.B. v. Cone Mills Corp.*, 373 F.2d 595 (4th Cir. 1967). In the latter case, it was held that union shop and check-off provisions do not survive the termination of the contract, and the employer may unilaterally discontinue them after the contract comes to an end without affording the union an opportunity to bargain.

As noted in *Eastern Airlines, Manning v. American Airlines*, 329 F.2d 32 (2d Cir. 1964), cert. denied 379 U.S. 817 (1964), is distinguishable on the grounds that the statutory conciliation procedures in *Manning* had not been exhausted before American attempted a unilateral change. The opinion reads in part:

> "... the very purpose of §6 (of the Act) is to stabilize relations by artificially extending the lives of agreements *for a limited period* regardless of the parties' intentions." (emphasis supplied)

Thus the *Manning* court recognized that the Act does not operate to extend the terms of the collective bargaining agreements forever, but only for the "limited period" specified in the Act.

In *Brotherhood of Railroad Trainmen v. Alcron & Barberton Belt R. Co.*, 385 F.2d 581 (C.A.D.C. 1967), cert. denied 390 U.S. 923 (1968), after the exhaustion of the statutory procedures Congress passed a law which expressly forbade any unilateral self-help by

the parties. Public Law 88-108, 77 Stat. 132 (1963). A Board of Arbitration was set up and directed to render an award binding upon all parties. The award was to continue in force for not over two years. The Unions claimed that there should be a return to the status quo as it existed prior to the special act of Congress; the carriers asserted that the awards transcended the two-year period and declined to bargain in good faith as to certain proposals covered in the award.

The Court ruled that the award had created a new "plateau" or status quo, and that both parties were required to abide by the terms of the Railway Labor Act prior to the expiration of the award before resorting to self-help. But once matters reached a point where self-help measures are imposed by either party, then the Railway Labor Act no longer applies, its usefulness having come to an end.

The trouble with the Union's position is that it assumes that each term is a sort of mini-contract which can be separated from the whole agreement. Collective bargaining agreements result from patient negotiations and a certain amount of give-and-take. A Company agrees to fund a pension plan on the understanding that a Union will cut its demand for higher wages by half. The contract is not a series of severable clauses but an integrated whole. Once some of its terms are no longer in effect, the entire contractual scheme falls, and the disjointed remainder cannot fairly be said to represent a "status quo", even if one is required.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted this 18th day of April, 1973.

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